85-1461

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

No._____

October Term 1985

JAMES AIKEN, WARDEN, C.C.I., AND TRAVIS MEDLOCK, ATTORNEY GENERAL, STATE OF SOUTH CAROLINA,

Petitioners,

vs

WILLIAM GIBBS HYMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I.

I. In light of the decision in Cabana v. Bullock, 54 U.S.L.W. 4105, (January 22, 1986), did the Court below misconstrue this Court's mandate in Enmund v. Florida, 458 U.S. 782 (1982), in requiring jury findings that Hyman killed, attempted to kill, or intended to kill?

II. Did the Court below err in failing to accord findings of the state supreme court, state post conviction court, and the implicit findings of the jury the presumption of correctness mandated by 28 U.S.C. § 2254?

III. Did the Court below err in vacating the death sentence and remanding for a new sentencing proceeding de novo when there are state court findings of fact that he "killed, attempted to kill, intended to kill, or intended that lethal force be used"?

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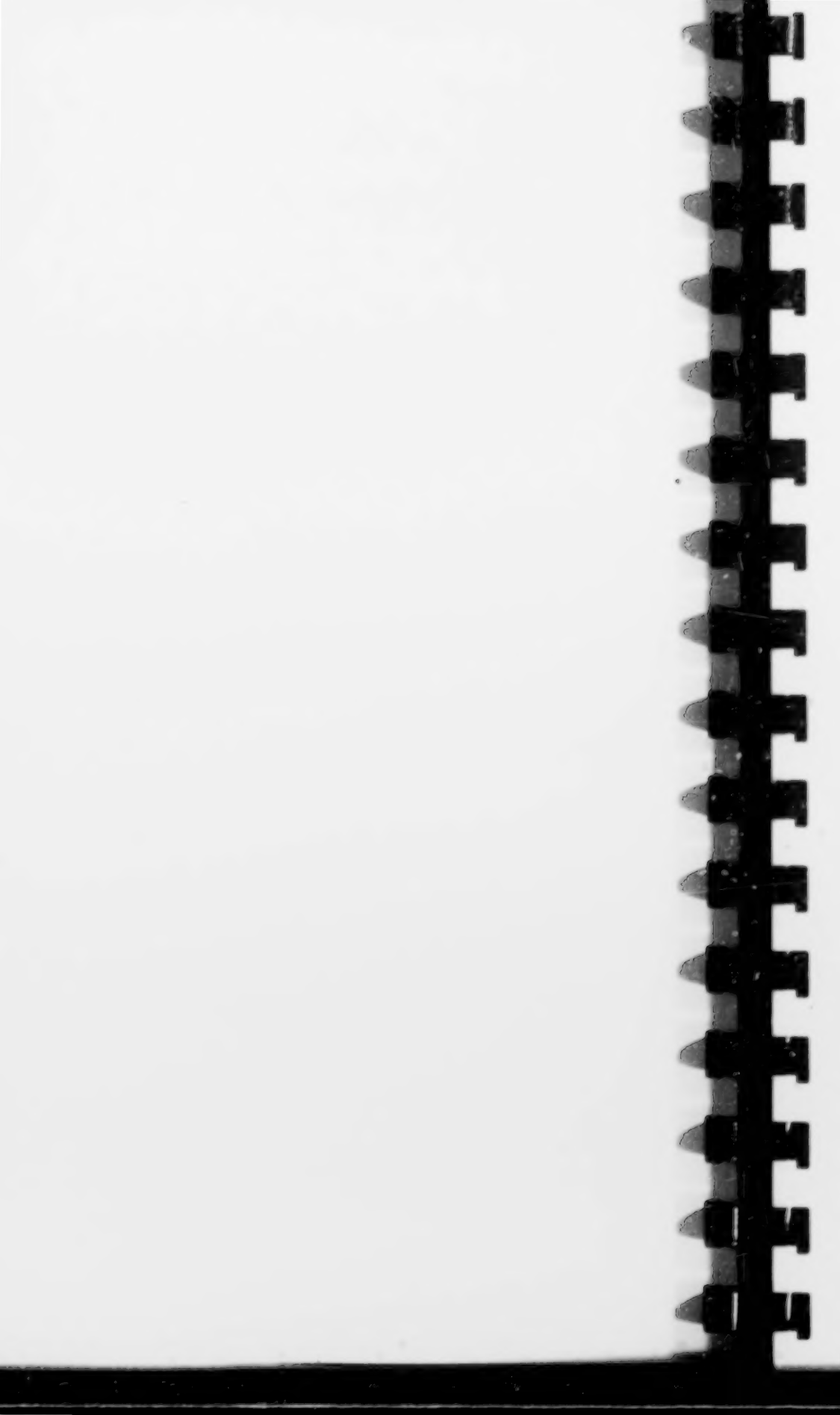

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No._____

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JAMES AIKEN, WARDEN, C.C.I., AND TRAVIS MEDLOCK, ATTORNEY GENERAL, STATE OF SOUTH CAROLINA,

Petitioners,

vs

WILLIAM GIBBS HYMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Attorney General of South Carolina, on behalf of the named Petitioners and the State of South Carolina, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing and refusing the suggestion for rehearing en banc, filed January 21, 1986, is unreported and is appended hereto as Appendix A at page 28.

The opinion of the United States Court of Appeals for the Fourth Circuit entered November 25, 1985, vacating the judgment of the United States District Court for the District of South Carolina and remanding the case with direction to grant Hyman a writ of habeas corpus unless within a reasonable time the state resentences him in proceedings that conform with the Eighth and Fourteenth Amendments, reported at 777 F.2d 938, is appended hereto as Appendix B at page 30.

The Opinion of the United States District Court denying the petition for a writ of habeas corpus is reported at 606 F.Supp. 1046, and its pertinent portions are appended hereto as Appendix C at page 46.

JURISDICTION

The petition for certiorari is for review of the judgment of the United States Court of Appeals for the Fourth Circuit in a 28 U.S.C. § 2254 habeas corpus action entered on November 25, 1985. By order filed January 22, 1986, the petition for rehearing and suggestion for rehearing en banc were denied.

This Court has jurisdiction to review the opinion rendered below pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution which provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. The relevant statutory provision, 28 U.S.C. § 2254, is reproduced as Appendix F..

STATEMENT OF THE CASE

I. State Court Proceedings

After a four-day jury trial, William Gibbs Hyman was convicted of murder and armed robbery on October 11,

1979, in the Court of General Sessions for Charleston County, South Carolina. The next day the jury recommended the death penalty in accordance with S.C. CODE ANN. § 16-3-20 (Supp. 1984). The conviction and sentence were upheld on a direct appeal to the South Carolina Supreme Court in State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981), cert. denied, 458 U.S. 1122 (1982), reh. denied, 458 U.S. 1132 (1982).

On July 7, 1982, Hyman filed his first Application for Post Conviction Relief pursuant to S.C. CODE ANN. § 17-27-10, et seq. (1976). After an extensive evidentiary hearing, the matter was denied by written Order of the Honorable James M. Morris, Presiding Judge. (Appendix D). The matter was appealed to the South Carolina Supreme Court pursuant to Supreme Court Rule

50(9) which denied his Petition for Certiorari. A Petition for Certiorari to the United States Supreme Court was also denied. Hyman v. South Carolina, __U.S.__, 104 S.Ct. 2182, 80 L.Ed.2d 563 (1984).

Hyman then filed a petition for a writ of habeas corpus in the federal district court. The district court denied the writ. Hyman v. Aiken, 606 F.Supp. 1046 (D.S.C. 1985). (Appendix C). Hyman appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit concluded that the judgment of the district court must be vacated because of an alleged error in the instructions concerning the punishment. The Court found that the instructions given were inconsistent with Enmund v. Florida. The Court concluded that the instruction allowed

the jury to recommend a death sentence for Hyman as an aider and abettor without finding that he killed, attempted to kill, or intended to kill the robbery victim. The relief was to have Hyman resentenced in a proceeding that conforms with the Eighth and Fourteenth Amendments. The Petitioners made a petition for rehearing and suggestion for rehearing en banc. On January 21, 1986, (one day before this Court's decision in Cabana v. Bullock) the Court denied the petition.

II. The State Court Findings of Fact

In the Hyman case, as in South Carolina law, the jury was instructed that murder was "the killing of any person with malice aforethought." (A. pp. 769-770). Accord: S.C. CODE ANN. § 16-3-10 (Cum. Supp. 1984). In addition,

the jury was charged accomplice criminal liability that required the state to establish that this "defendant was present; that he was there with a criminal intent; that is, with the intent either to commit the crime or to aid, encourage, assist others or another in the commission of the crime." (A. p. 773).

The guilt phase evidence from the State revealed uncontradicted evidence that Hyman conceived the plan of the robbery. On Saturday night, March 24, 1979, William Gibbs Hyman, his wife, Doris, Sue Allday, Robert Hinson and Iris Midgett arrived at the Winchester Club, a bar and lounge in North Charleston, South Carolina. After seating themselves at a booth, the group ordered a round of drinks. At some point, the conversation turned to "shortage of money." (A. p. 393).

According to Sue Allday, "Gibbs said something about let's go out to Ravenel and get Iris's (sic) boys." (A. p. 393). "Iris' boys" were Teagus and Collins Griffis. They were two elderly men who lived in a mobile home or trailer in Ravenel, South Carolina. They were called "Iris' boys" because Iris Midgett and another woman, Mary Taylor, previously robbed them of $1,690. Hoping that the men would again have a large amount of cash on hand, the group decided to rob them by either deception or violence.

After procuring a 20-gauge double-barreled shotgun and a bag full of shotgun shells, the group proceeded to Ravenel in Hyman's car. Sue Allday was given the responsibility of driving because she was considered to be more sober than anyone else in the party.

After arriving at the Griffis home and parking the car, Gibbs Hyman (carrying the shotgun), Doris Hyman, Sue Allday and Robert Hinson approached the trailer. Iris Midgett remained in the car. To avoid being seen by the occupants, Hinson and Gibbs Hyman took positions against the wall of the trailer on either side on the trailer door. Sue Allday and Doris Hyman knocked on the door. Someone inside the trailer asked for their identity. The women gave fictitious names and stated that they were experiencing car trouble. Collins Griffis opened the door. A short conversation followed; Mr. Griffis then invited the ladies inside the trailer to have a drink. Doris Hyman refused. Griffis, apparently angry over the refusal, went back inside the trailer, shut the door, and the women returned to the car.

Hinson and Hyman followed them. Hyman and his wife had a heated exchange of words because she had angered their victims. At this point, it was suggested that the robbery be aborted. Hyman said "he wasn't going nowhere without the money." (A. p. 412).

Thereafter, Hyman, Sue Allday and Robert Hinson went back to the trailer door. While Allday knocked on the door, Hinson and Hyman "crouched down right beside the steps." Someone inside the trailer asked them to leave, "and he inferred that he knew that [they] were there for a robbery." The party did not retreat even though the occupant threatened to shoot them. Suddenly, the door swung open and one of the Griffis brothers shot Robert Hinson in the leg. Allday, from the ground, fired a shot up inside the trailer. A melee ensued.

Collins Griffis was struck in the head several times with the butt and barrel of a shotgun. Blood was splattered throughout the trailer. Teagus Griffis was shot twice. Sue Allday testified that Hyman grabbed the gun from her when she was unable to shoot the man who shot Hinson. One shot, fired from a distance of greater than two or three feet, entered his chest at a downward angle. The wound it inflicted was about the size of a quarter. As a result of this shot, "the main part of the right side of the heart was destroyed ... ." The second shot, fired at an upward angle, caused "a grazed wound" to the right shoulder. Teagus Griffis died immediately. The shotgun owned by the Griffis' was taken from the trailer. After assisting the wounded Hinson to the car, the party drove back to

Charleston and dropped him off at a local hospital.

Hyman chose not to present any testimony or evidence to challenge the State's theory in the guilt phase. The jury's verdict of guilty of murder, at the conclusion of the guilt phase confirmed a finding of specific intent--malice. As we asserted in the Courts below, this finding should preclude further inquiry under Enmund because it reflected a jury finding, although at the guilt phase that Hyman possessed the culpability necessary to allow the imposition of the death sentence under Enmund.

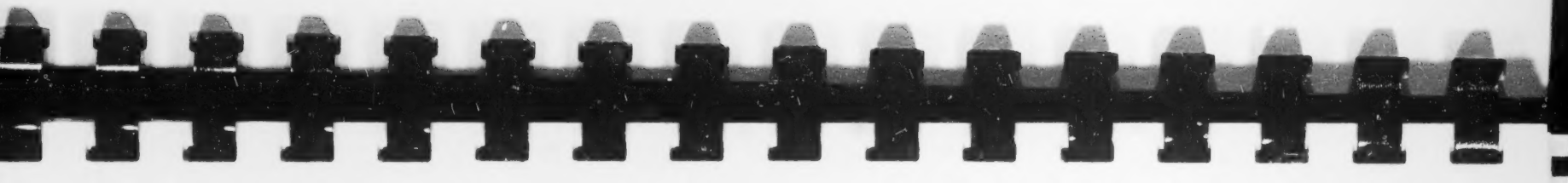
During the penalty phase of the trial, Hyman testified that he was at the scene of the crime, but that he had no recollection of the events or sequence of events on the night of the

crime with the co-defendants. (A. pp. 816-828). He said he was upset that his brother-in-law had beaten up his sister. He had gone to the club to meet Iris Midgett to help locate the brother-in-law. On cross-examination, Hyman acknowledged that he was previously aware of the victims and their money, but said he thought they were going to his brother-in-law's. As the District Court held, he did not deny any of the events that led up to the shooting, he only denied that he killed Teagus Griffis. (A. p. 821).

During the State's closing argument, the Solicitor told the jury "if you find that he did not pull the trigger, you should not recommend the death penalty, they should all be treated equally." (A. p. 848, 11. 23-25). Clearly, it was the state's

position throughout the entire trial that Hyman was the triggerman. After the charge of the Court and during the jury's sentencing deliberation, the Foreman asked whether they had "to prove that he did the actual killing." (A. p. 880, l. 10). The trial court instructed the jury that "it would be proper for you to consider in matters of mitigation or aggravation obviously whether this Defendant used the weapon or whether he didn't." (A. p. 882).

The South Carolina Supreme Court addressed the culpability issue in two parts of its opinion. Hyman urged on appeal that the trial judge should have charged that they could find as a statutory mitigating circumstance (1) that he was an accomplice in a murder committed by another person and his participation was relatively minor or



(2) he was provoked by the victim. The Supreme Court found "there was no evidence in the record to support such a charge, therefore, the judge did not err by refusing the instruction." State v. Hyman, supra.

Addressing the proportionality of the death sentence, the South Carolina Supreme Court made the following finding:

> The record clearly reflects appellant planned, prepared and committed a brutal crime for the purpose of obtaining money. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case.

(Appendix E).

During the state post conviction hearing, Hyman testified in a further attempt to refine his testimony on his culpability. The Honorable James M. Morris, after reviewing his demeanor and

the overall record made the following findings and conclusion:

> I find the imposition of the death penalty in this case does not offend the standards set out in Enmund v. Florida, 50 U.S.L.W. 5087 (1982). The evidence shows that the Applicant did intend the death of the victim. The record clearly reflects that Applicant planned, prepared for and committed a brutal crime for the purpose of obtaining money. State v. Hyman, supra. A shotgun and ammunition were taken to the scene by Applicant and his accomplices. Additionally, there was testimony at the trial that Applicant was, in fact, the triggerman. Under the facts and circumstances of this case, Applicant cannot seriously contend that he did not intend or contemplate that life would be taken ... .

(A. pp. 1864-1865) (Order of State Post Conviction Relief, Judge Morris, March 8, 1983). (Appendix D, emphasis added).

REASONS FOR GRANTING THE WRIT

I.

> The Opinion Below is in Direct Conflict with this Court's Mandate in Cabana v. Bullock, 54 U.S.L.W. 4105 (1986).

The Fourth Circuit ruled, in its opinion below, that its review of culpability was limited to the jury instructions. It further ordered as relief resentencing proceedings. In essence, it held that an individual could be sentenced to death only if a jury made a finding in the punishment stage of a bifurcated trial that the person killed, attempted to kill, or intended to kill. This conclusion was made in a record that included an implicit jury finding of adequate culpability at the guilt phase, appellate court findings of his planning, preparation, and commission of the brutal crime, and a collateral state hearing judge's finding, after reviewing the demeanor of the defendant from the witness stand that "he did intend the death of the victim."

The decision of the Fourth Circuit is clearly in conflict with the decision the Court recently rendered in Cabana v. Bullock, __U.S.__, 54 U.S.L.W. 4105 (January 22, 1986). With deference to the Court below, it did not have the reasoning of this decision before it because rehearing on this issue was denied one day before Cabana was released. The decision in Cabana virtually requires this Court to grant certiorari because the Court's decision failed to comply with the new Cabana mandates in the following regards:

1. The Court limited its inquiry to the jury instructions on the Enmund inquiry.

2. The Court failed to accord the state court findings of fact at the trial, appeal, or state post conviction relief court, the presumption of correctness each of those findings were entitled in federal habeas proceedings.

> 3. The court remanded the case for a new sentencing proceeding de novo rather than reviewing the entire record to determine if the state court had found that the defendant possessed the requisite degree of culpability under Enmund v. Florida, or the limited remand suggested in Cabana.

The continuation of the opinion below on the State irreconciably conflicts with the Court's mandate in Cabana and renders its effect meaningless on the one case to which it clearly applies.

Hyman raised in the court below a claim that he was not the triggerman and the death penalty was therefore constitutionally disproportionate. Recently, he relied on the Court's decision in Enmund v. Florida, 458 U.S. 782 (1982). In Cabana, this Court held:

> When a federal habeas court reviews a claim that the death penalty has been imposed on one who has neither killed, attempted to kill, nor intended that a killing take place or that lethal force be used, the court's inquiry cannot be limited to an examination of jury

> instructions. Rather, the court must examine the entire course of the state proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made.

Cabana, 54 U.S.L.W. 4105, 4108. A review of the decision of the court below failed to meet these responsibilities and looked exclusively to the jury instructions in the punishment (not guilt) phase. See: Hyman v. Aiken, 777 F.2d at 939-940. In this case, the jury was instructed with a guilt phase charge that required a finding of his specific "intent to commit the crime or to aid, encourage, assist, others or another, in the commission of the crime." (A. p. 773). In this case, the court below ignored that there was no evidence in the record, as found by the State Supreme

Court that Hyman was an accomplice or that his participation was relatively minor. Further, the State Supreme Court, in the direct appeal, made the following finding that is entitled to the presumption of correctness:

> The record clearly reflects that appellant [Hyman] planned, prepared and committed a brutal crime for the purposes of obtaining money. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case.

(A. p. 1353). State v. Hyman, 281 S.E.2d 209, 215. Clearly, this finding satisfies Enmund / Cabana by making an appellate finding that Hyman himself has "actually killed, attempted to kill, or intended that lethal force be used." Cabana v. Bullock, supra, 54 U.S.L.W. at 4109.

The Fourth Circuit also ignored the collateral findings of fact by the state

post conviction hearing judge after an Enmund claim was raised before it. This finding was made after the defendant testified and had his credibility reviewed (and obviously rejected) by the state trier of fact. In its written Order, the state judge held:

> I find the imposition of the death penalty in this case does not offend the standards set out in Enmund v. Florida, 50 U.S.L.W. 5087 (1982). The evidence shows that the Applicant did intend the death of the victim. The record clearly reflects that Applicant planned, prepared for and committed a brutal crime for the purpose of obtaining money. State v. Hyman, supra. A shotgun and ammunition were taken to the scene by Applicant and his accomplices. Additionally, there was testimony at the trial that Applicant was, in fact, the triggerman. Under the facts and circumstances of this case, Applicant cannot seriously contend that he did not intend or contemplate that life would be taken ... .

(A. pp. 1864-1865) (Order of State Post Conviction Relief, Judge Morris, March 8, 1983). (Appendix D, emphasis added).

No other conclusion can be reached but that the state courts in South Carolina, with findings clearly entitled to the presumption of correctness under 28 U.S.C. § 2254, has made requisite findings of culpability under Cabana v. Bullock analysis.

Assuming arguendo that the merits of Hyman's Enmund claim cannot be rejected on the basis of the present record, the decision below erred in its relief in requiring a new sentencing proceeding.

The Court in Cabana held:

> ... the Eighth Amendment does not require that a jury make the findings required by Enmund. Moreover, the sentence currently in force may stand provided only that the requisite findings are made in an adequate proceeding before some appropriate tribunal -- be it an appellate court, a trial judge, or a jury.

Cabana, supra, at 4109. Assuming arguendo that the prior state proceedings did not satisfy Enmund / Cabana, the limited relief granted in Cabana by the United States Supreme Court should apply. The relief in Cabana was as follows:

> ... the District Court should be directed to issue the writ of habeas corpus vacating Bullock's death sentence but leaving the State of Mississippi the choice of either imposing a sentence of life imprisonment or, within a reasonable time, obtaining a determination from its own courts of the factual question whether Bullock killed, attempted to kill, intended to kill or intended that lethal force would be used. If it is determined that Bullock possessed the requisite culpability, the death sentence may be reimposed. ...

54 U.S.L.W. at 4110. The decision below conflicts with Cabana, as well as Jackson v. Denno, 378 U.S. 368, 393 (1964). The state court should be

required only to provide "a reliable determination as to whether he is subject to the death penalty as one who has killed, attempted to kill, or intended that a killing take place or that lethal force be used." Cabana, 54 U.S.L.W. 4109.

While we submit above that this has already been provided by South Carolina, the relief upon this claim must provide no more than that which is constitutionally provided. Considerations of federalism and comity indicate the appropriateness for granting certiorari to constitutionally correct the inappropriate burdens placed upon this prosecution by the court below. The Court has already held such in Cabana, we merely ask this Court to allow its mandate to have the effect and force of law.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit in this case conflicts and contravenes the decisions of this Court and undermines the principles of federalism and comity. For the reasons stated herein, Petitioners urge this Court to grant the writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 85-4002

WILLIAM GIBBS HYMAN,

Appellant,

versus

James Aiken, etc., et al,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Falcon B. Hawkins, District Judge.

The appellant's and appellees' petitions for rehearing and suggestions for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestions for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Russell and Judge Sneeden.

For the Court,

s/John M. Greacen
CLERK

Filed January 21, 1986

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 85-4002

WILLIAM GIBBS HYMAN,

Appellant,

versus

James Aiken, Warden, CCI,
and Travis Medlock, Attorney
General, State of South Carolina,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Falcon B. Hawkins, District Judge. (CA 84-1763-1)

Argued: 10/9/85 Decided: 11/25/85

Before RUSSELL AND SNEEDEN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Coming B. Gibbs, Jr. (Gibbs & Holmes; Ann M. Stirling on brief) for Appellant; Donald J. Zelenka, Chief Deputy Attorney General (T. Travis Medlock, Attorney General on brief) for Appellee.

APPENDIX B

BUTZNER, Senior Circuit Judge:

William Gibbs Hyman appeals the district court's denial of his petition for a writ of habeas corpus. Hyman was convicted by a South Carolina jury of armed robbery and murder. In the second phase of the proceedings, the jury recommended that he be sentenced to death, and the trial judge accepted this recommendation. The judgment was affirmed in State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981), cert. denied 458 U.S. 1122 (1982). Hyman then sought post-conviction relief, which was denied after an evidentiary hearing. The South Carolina Supreme Court, in an unpublished order, and the United States Supreme Court denied Hyman's petitions for certiorari. Hyman v. South Carolina, 104 S.Ct. 2182 (1984). Hyman then filed a petition for

a writ of habeas corpus in the federal district court. The magistrate to whom the petition was referred recommended that the writ should issue. The district court sustained the state's objections to the magistrate's report and denied the writ. Hyman v. Aiken, 606 F.Supp. 1046 (D.S.C. 1985).

In South Carolina, capital cases are tried in two stages. The first is on the issue of guilt or innocence, and the second is on the issue of punishment, utilizing the same jury. See S.C. Code Ann. §16-3-20. We conclude that the judgement of the district court must be vacated because of error in the instructions pertaining to punishment. We find no error warranting reversal in the guilt phase of the trial.

I

The facts are set out in length in the opinion of the district court. 606 F.Supp. at 1049-50. For purposes of this review, a brief summary will suffice. Hyman and several of his friends robbed two elderly men. In the course of the robbery, one of the victims was killed and the other was badly beaten. Hyman did not testify in the guilt phase of the trial. The evidence was sufficient to establish that Hyman was guilty of murder and robbery.

At the sentencing phase of trial, Hyman testified. He stated that he was intoxicated, that he had a gun because he was looking for his brother-in-law who had beaten his sister, that when he set out with his friends he thought he

was going to his brother-in-law's trailer, and that one of his friends drove his car because he was too intoxicated to drive. He stated flatly: "I did not kill the man."

During his summation in the sentencing proceedings, the prosecutor told the jury: "If you find that he did not pull the trigger, you should not recommend the death penalty." The judge's charge on this aspect of the case was not as precise.

After the jury had deliberated about three hours, the foreman inquired: "Do we have to prove that he did the actual killing?" In response, the trial judge again explained South Carolina law pertaining to consideration of aggravating and mitigating circumstances. In the course of his

instruction, he stated: "You may return a death sentence if there is a mitigating circumstance present if you find at least one of the aggravating circumstances." He concluded his supplementary charge with the following instruction:

> I charged you earlier that a person who aids and assists another in the commission of the offense or who was present at the time and committed the offense, would be equally guilty because under the hand of one, the hand of all theory, a person who commits the offense in concert with others is guilty obviously and anyone who assists the person committing an offense is guilty. But you've passed the question of guilt or innocence. It would be proper for you to consider in matters of mitigation or aggravation obviously whether this Defendant used the weapon or whether he didn't; but I'm not going to get into the facts with you now and try to reach any decision or suggest any opinion I may have as to what

your position should be so far as a recommendation of sentence because under our Constitution, I can't comment on the facts. . . .

Within an hour, the jury returned its verdict finding the existence of the following statutory aggravating circumstance: "That murder was committed while in the commission of an armed robbery." It recommended to the court that Hyman be sentenced to death. At neither the guilt phase nor the sentencing phase did the jury specify which of the criminals was the actual killer. It was not required to make a finding on this issue because the court charged that the jury could find Hyman guilty and it could recommend death if he aided and abetted the other criminals.

In Lockett v. Ohio, 438 U.S. 586, 605 (1978), the Court explained that "individualized consideration [is] a constitutional requirement in imposing the death sentence." The Court reiterated its insistence on observance of this precept in Enmund v. Florida, 458 U.S. 782, 798 (1982). It held that the eighth and fourteenth amendments prohibited imposition of the death penalty on a criminal who aids and abets a robbery in the course of which a murder is committed unless the criminal killed, attempted to kill, or intended to kill. 458 U.S. at 798 and 801.

The court's supplementary instruction in response to the foreman's question is inconsistent with Enmund v. Florida. Having found that murder was committed during an armed robbery, the

jury could reasonably conclude that the instruction authorized it to recommend the death sentence even if it found as a mitigating circumstance that Hyman was not personally responsible for the murder. The instruction allowed the jury to recommend a death sentence for Hyman as an aider and abettor whether or not he killed, attempted to kill, or intended to kill the robbery victim.[1]

---

1. The conclusion we reach is consistent with State v. Peterson, ___ S.C. ___, ___, ___ S.E.2d ___, ___, No. 22381 (Oct. 14, 1985), where the Supreme Court of South Carolina instructed trial courts as follows:

> During the penalty phase of death penalty cases which involve conspiracy liability, the trial judge should charge that the death penalty can not be imposed on an individual who aids and abets in a crime in which a murder is committed (footnote continued)

Consequently, the sentence of death imposed on recommendation of an erroneously instructed jury cannot be carried out, and Hyman must be resentenced.

In South Carolina, malice is an element of murder. The trial judge's charge to the jury included the following: "[M]alice is implied, it's presumed from the willful, the deliberate, the intentional doing of an unlawful act without just cause of excuse. . . . Malice is presumed or implied from the use of a deadly weapon."

(1. continued) by others, but who did not himself kill, attempt to kill, or intend that a killing take place or that lethal force be used.

Hyman claims that this instruction improperly shifted the burden with respect to an element of the crime which the state was required to prove beyond a reasonable doubt.

Recently in Yates v. Aiken, 85-5193, 54 U.S.L.W. 3251 (U.S. Oct. 7, 1985), the Supreme Court considered an instruction that is indistinguishable from the instruction given in Hyman's case. It vacated the judgment of the Supreme Court of South Carolina and remanded the case for reconsideration in the light of Francis .. Franklin, 105 S.Ct. 1965 (1985).

In Francis, the Court held an instruction creating a mandatory presumption which relieves the state of the burden of proving an element of an

offense violates the due process clause even though the presumption is rebuttable. Although the instruction must be viewed in the context of the entire charge, general instructions pertaining to the burden of proof and the presumption of innocence do not remedy the error. 105 S.Ct. at 1971-73.[2] For the purpose of this opinion, we may assume that the malice instruction given in Hyman's trial was erroneous. It does not follow, however,

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2. The Supreme Court of South Carolina has now directed that "[e]very judge in South Carolina should delete from their malice charges all phrases denoting a presumption or a rebuttable presumption." State v. Peterson, ___ S.C. ___, ___, ___ S.E.2d ___, ___, No. 22381 (Oct. 14, 1985).

that Hyman is entitled to the writ on this ground.

In Fulton v. Warden, 744 F.2d 1026, 1031-32 (4th Cir. 1984), we held that an instruction which unconstitutionally shifted the burden of proof to the defendant did not always require reversal. Instead, in a habeas corpus proceeding, the record should be examined to determine whether the error rendered the trial fundamentally unfair. Hyman does not contend that the murder of the robbery victim was unaccompanied by malice. At the sentencing phase, he flatly denied that he was the killer, and he elaborated on this denial in the post-conviction proceedings. Viewed in this context, the erroneous instruction on the presumption of malice did not render the trial fundamentally unfair.

Hyman also contends that his trial counsel were ineffective. The magistrate found that Hyman was denied effective assistance of counsel. The district court did not accept this finding. Nevertheless, the magistrate and the district court agreed that Hyman had failed to establish prejudice because of his counsel's representation. On this issue, they relied on Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984), where the Court stated: "[T]he defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Hyman's most serious charges against his trial counsel involved the

deficiencies that he perceives in their conduct of the sentencing phase of his case. Our conclusion that the sentence of death was improperly imposed renders the issue of incompetency at this phase of the proceedings moot.

With respect to the issue of incompetency of counsel at the guilt phase of the proceedings, we agree for reasons adequately stated by the district judge and the magistrate that the representation which Hyman received did not deprive him of a fair trial. On the issue of guilt, the result of the trial was reliable. 606 F.Supp. at 1063-74.

The judgment of the district court is vacated, and this case is remanded with instructions to grant Hyman a writ of habeas corpus unless within a

reasonable time the state resentences him in proceedings that conform with the eighth and the fourteenth amendments. The order of the district court should not otherwise disturb the judgment of conviction.

VACATED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

WILLIAM GIBBS HYMAN, Petitioner, vs. JAMES AIKEN, WARDEN, CCI, AND TRAVIS MEDLOCK, ATTORNEY GENERAL, STATE OF SOUTH CAROLINA, Respondents.	CA #84-1763-1J ORDER

Petitioner William Gibbs Hyman was found guilty of murder and armed robbery by a jury. In a separate proceeding he was sentenced to death. Hyman now petitions this court for habeas corpus relief, 28 U.S.C. §2254. The case was referred to United States Magistrate Robert S. Carr pursuant to 28 U.S.C. §636(b)(1)(B) and the local rules of this court. Magistrate Carr recommends

that this court enter its order denying the respondents' motion for summary judgment and granting the writ of habeas corpus unless the State of South Carolina grants Hyman a new trial within a reasonable period of time. His recommendation is based, in part, upon the finding that the trial judge's jury charge of a presumption of malice unconstitutionally established a mandatory or burden-shifting presumption which conflicted with the petitioner's presumption of innocence. He also found the same portion of the charge unconstitutionally confusing. In addition, he concluded that the trial court unconstitutionally precluded the jury from considering nonstatutory mitigating circumstances. Finally, Magistrate Carr found Hyman's trial

counsel ineffective in several particulars, but he also found that, absent these errors, there was not a reasonable probability that the outcome of the trial would have been different.

The respondents and Hyman filed exceptions to Magistrate Carr's report. After carefully considering all the exceptions, this court is of the opinion that a writ of habeas corpus should not be granted. This court is also of the opinion that the respondent's motion for summary judgment should be granted.

PROCEDURAL HISTORY

After the four day trial, Hyman was convicted of murder and armed robbery on October 11, 1979. The next day, the jury recommended the death sentence in a separate proceeding conducted in accordance with S.C. CODE ANN.

§16-3-20-26 (cum. supp. 1984).[1] The conviction and sentence were upheld on direct appeal to the South Carolina Supreme Court in State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981), cert. denied, 458 U.S. 1122 (1982), reh. denied, 458 U.S. 1132 (1982).

On July 7, 1982, Hyman filed his first application for post-conviction relief. S.C. CODE ANN. §17-27-70 et seq. (Law. Co-op. 1976). South Carolina State Circuit Court Judge James M. Morris held an extensive evidentiary hearing, the transcript of proceedings

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[1]Hyman's case was prosecuted under the current law which is patterned after the Georgia Statute upheld in Gregg v. Georgia, 428 U.S. 153 (1976).

covers nearly 1700 pages. On March 8, 1983, Judge Morris dismissed Hyman's application in a thorough 45-page order. Following this, Hyman petitioned the State Supreme Court for a writ of certiorari. This, too, was denied. A second application for post-conviction relief was filed on July 11, 1984. This application was also denied by the South Carolina Supreme Court on July 25, 1984.

On July 26, 1984, Hyman filed this application for habeas corpus relief, asserting a plethora of grounds. On August 9, 1984, the respondents filed their return to the petitioner's application and moved for summary judgment.[2]

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[2]Hyman admits that, except for one particular, the record before the court is sufficient and complete and that

BACKGROUND

On Saturday night, March 24, 1979, William Gibbs Hyman, his wife, Doris, Sue Allday, Robert Hinson and Iris Midgett arrived at the Winchester Club, a bar and lounge in North Charleston, South Carolina. After seating themselves at a booth, the group ordered a round of drinks. At some point, the conversation turned to "shortage of money." [Tr. 41]. According to Sue Allday, "Gibbs said something about let's go out to Ravenel and get Iris's

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([2] continued) there is no need for additional evidentiary hearings. To remedy this defect, the magistrate examined records that the state post-conviction judge refused to consider. He found them of no value in assessing Hyman's claim.

[sic] boys."[3] [Tr.41]. Iris' boys were Teagus and Collins Griffis. They were two elderly men who lived in a mobile home or trailer in Ravenel, South Carolina. They were called "Iris' boys" because Iris Midgett and another woman, Mary Taylor, previously robbed them of $1,690. Hoping that the men would again have a large amount of cash on hand, the group decided to rob them by either deception or violence.

After procuring a 20-gauge double-barreled shotgun and a bag full of shotgun shells, the group proceeded to Ravenel in Hyman's car. Sue Allday was given the responsibility of driving

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[3]This testimony was corroborated by Robert Hinson [Tr. 177] and Iris Midgett [Tr. 218-19].

because she was considered to be more sober than anyone else in the party. After arriving at the Griffis home and parking the car, Gibbs Hyman, Doris Hyman, Sue Allday and Robert Hinson approached the trailer.[4] Iris Midgett remained in the car.[5] To avoid being seen by the occupants, Hinson and the petitioner took positions against the wall of the trailer on either side of the trailer door. Sue Allday and Doris Hyman knocked on the door. Someone

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[4]On the first approach to the trailer, the loaded 20-gauge shotgun was carried by Gibbs Hyman.

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[5]It was agreed by all that she should remain in the car. If the Griffis brothers recognized her because of the earlier robbery, the present scheme might be thwarted.

inside the trailer asked for their identity. The women gave fictitious names and stated that they were experiencing car trouble. Collins Griffis opened the door. A short conversation followed; Mr. Griffis then invited the ladies inside the trailer to have a drink. Doris Hyman refused. Griffis, apparently angry over the refusal, went back inside the trailer, shut the door, and the women returned to the car.

Hinson and the petitioner followed them. Hyman and his wife had a heated exchange of words because she had angered their victims. At this point, it was suggested that the robbery be aborted. Hyman said "he wasn't going no where without the money." [Tr.60].

Thereafter, the petitioner, Sue Allday[6] and Robert Hinson went back to the trailer door. While Allday knocked on the door, Hinson and Hyman "crouched down right beside the steps." [Tr.62]. Someone inside the trailer asked them to leave, "and he inferred that he knew that [they] were there for a robbery." [Tr.63]. The party did not retreat even though the occupant threatened to shoot them. Suddenly the door swung open and one of the Griffis brothers shot Robert Hinson in the leg. Allday, from the ground fired a shot up inside the trailer. A melle ensued. Collins Griffis was struck in the head several times with the butt and barrel of a

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[6]On the second trip to the trailer door, Sue Allday carried the loaded 20-gauge shotgun.

shotgun. Blood was splattered throughout the trailer. Teagus Griffis was shot twice.[7] One shot, fired from a distance of greater than two to three feet, entered his chest at a downward angle. The wound it inflicted was about the size of a quarter. As a result of this shot, "the main part of the right side of the heart was destroyed. . . ." [Tr.264]. The second shot, fired at an upward angle, caused "a grazed wound" [Tr.265] to the right shoulder. Teagus Griffis died immediately. The shotgun owned by the Griffis' was taken from the trailer. After assisting the wounded Hinson to the car, the party drove back

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[7]Allday testified that Hyman grabbed the gun from her when she was unable to shoot the man who shot Hinson.

to Charleston and dropped him off at a local hospital.

About a week later, Hyman, as well as all the other participants, were arrested and charged with murder and armed robbery. Hyman's family, through his brother, retained D. J. Stratos, Esq. of the Charleston County Bar to represent the petitioner and his wife. Doris Hyman subsequently obtained other counsel.

At the May 1979 term of the Court of General Sessions for Charleston County, Gibbs Hyman, Doris Hyman, Iris Midgett, Robert Hinson and Sue Allday were indicted for the shotgun murder of Teagus Griffis. They were also indicted for armed robbery because they allegedly took the victim's shotgun.

Pursuant to a plea agreement with the Charleston County Solicitor, Robert Hinson pled guilty to common law murder

on July 20, 1979. He received a life sentence. Under a similar agreement, Sue Allday pled guilty to common law murder and received a life sentence. Iris Midgett pled guilty to accessory before the fact of armed robbery. She was sentenced to serve 18 years in prison. Until the eve of the trial, the solicitor offered Gibbs Hyman the same plea agreement that was offered to Hinson and Allday. Despite numerous recommendations by his attorneys that he accept the plea, Hyman was adamant that he did not kill Teagus Griffis and that he was "going forward with the trial." [Tr.6].[8]

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[8]Doris Hyman was offered a plea agreement similar to that offered to Hinson, Allday and the Petitioner. She, like Hyman, refused to plead. After Hyman was convicted and sentenced to death, the state brought her to trial.

Sometime between July 6 and July 9, 1979, the solicitor notified Hyman of his intent to seek the death penalty in accordance with S.C. CODE ANN. §16-3-26(A) (cum. supp. 1984). On July 9, 1979, Clyde A. Eltzroth, Presiding Judge, Ninth Judicial Circuit, denied petitioner's motion to relieve Mr. Stratos as counsel. Because the death penalty was being sought, Judge Eltzroth, pursuant to S. C. CODE ANN. §16-3-26 (B) (cum. supp. 1984), instructed the Clerk of Court to appoint an additional attorney. Landon Louthian, Esq., also of the Charleston County Bar, was appointed as Hyman's second attorney on July 24, 1979.

As mentioned above, the solicitor continued to offer a plea bargain whereby the state would abandon its

request for the death penalty in return for a guilty plea to murder. Mr. Stratos and Mr. Louthian met separately and together with Hyman and advised him that the evidence against him was overwhelming. Therefore, they strongly recommended that it would be in his best interest to plead guilty and accept a life sentence. On October 8, 1979, the case proceeded to trial. Hyman was convicted of murder and armed robbery. Following a mitigation trial, the jury recommended the sentence of death on October 12, 1979.

THE "TRIGGERMAN" ISSUE

Magistrate Carr found that the petitioner was not denied due process because of the trial judge's failure to present a charge to the jury based on Enmund v. Florida, 458 U.S. 782, 102

S.Ct. 3368 (1982). [Mag.Rep.19-20]. Hyman objects to this finding. He argues that the magistrate misapprehended the proper place in the trial proceedings for a charge based on Enmund. "The Enmund instruction would not be given to a jury at the guilt phase, but instead, is a charge to be given to the jury when the jury is being required to sentence a defendant." [Pet.Obj.4]. (Emphasis is original). This court does not agree. On this point, the findings of the magistrate are adopted and incorporated into this order by specific reference.

In Enmund, the petitioner and a co-defendant were convicted at a jury trial in a Florida court of first-degree murder and armed robbery of two elderly persons. In a separate proceeding, the

jury recommended the death penalty for both defendants.[21] The trial judge found four statutory aggravating circumstances and sentenced Enmund to death. Enmund appealed. The Florida Supreme Court affirmed the conviction despite the fact that "[t]here was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered." Enmund v. State, 399 So.2d 1362, 1370 (Fla. 1981).

In reaching its decision to remand the case, the United States Supreme Court noted that "the record supported no more than an inference that Enmund

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[21] In Florida, the jury only advises the trial judge on whether to impose the death penalty.

was the person in the car by the side of the road at the time of the killing, waiting to help the robbers escape."[22] Enmund, 102 S.Ct. at 3372. The Court held that the eighth amendment bars the imposition of the death penalty for

> one. . .who aids and abets a felony in the course of a murder. . .but who does not himself kill, attempt to kill, or intend a killing take place or that lethal force ... be employed. 102 S.Ct. at 3376-77.

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[22] In Enmund, the majority took their view of the facts from the Florida Supreme Court's opinion. Enmund, Jeanette Armstrong, Sampson Armstrong, and Enmund's wife drove in Enmund's car to the home of the Kersey's. Jeanette and Sampson Armstrong went to the door while Enmund and his wife waited in the car. When Mr. Kersey came out of the house, Sampson Armstrong grabbed him, pointed a gun at him and told his wife to take his money. Mr. Kersey cried out for help and his wife came out of the house with a gun and shot Jeanette Armstrong, wounding her. Sampson Armstrong, and perhaps Jeanette Armstrong, then shot and killed the Kerseys, dragged them into the kitchen, took their money and fled.

The minority chastized the majority for their view. They contended that the trial judge's findings and the record (footnote continued)

In so holding, the Court stated that the "focus must be on [the particular defendant's] culpability, not on that of those who committed the robbery and shot the victims for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" Id. at 3377 (quoting Lockett v. Ohio, 438 U.S. 586, 605 [1978]).[23]

([22]continued) supported the view that Enmund "had initiated and planned the armed robbery and was in the car during the killings." 102 S.Ct. at 3380.

[23]Enmund, of course, was decided three years after Hyman's conviction. Lockett was decided a year before Hyman's trial. Apparently, Hyman thinks the trial judge should have anticipated the holding of Enmund because in a footnote in Lockett the Court observed that it was not addressing the contention "that the death penalty is

The facts of Hyman's case are significantly different from those presented in Enmund. Here, the evidence was uncontradicted that Hyman conceived the robbery. Then he, his wife, Iris Midgett, Sue Allday and Bob Hinson drove in Hyman's car with a double-barreled shotgun to the victim's home. Two of the women tried to gain access to the victim's house trailer by asking for help with a flat tire while Hyman, armed with a shotgun, and Hinson, laid in wait

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([23]continued) constitutionally disproportionate for one who has not been proved to have taken life, to have attempted to take life, or to have intended to take life. . .' 438 U.S. at 609, n.16. This argument lacks merit. The Constitution does not require a trial judge to be clairvoyant. Nonetheless, even if the trial judge could have divined the Enmund holding, a charge based upon it would not be applicable to Hyman.

to rob the victims. The first attempt failed. Hyman, Allday and Hinson regrouped and again mounted an assault on the trailer. While Allday, now armed with the shotgun, continued to try to coax the victims into opening the door to their residence, Hinson tried to force the door. Hyman laid in wait by the side of the residence. Once inside, Hyman terrorized the elderly men, beating one senseless and shooting the other.

It is true that Hyman did not testify at the guilt phase of the trial. Based on the evidence then before the jury, Hyman's culpability was practically undisputed. He could not seriously contend that he "did not himself kill," let alone that he did not intend that lethal force be employed.

Therefore, a charge based on Enmund would not have been appropriate.

At the penalty phase, Hyman's direct testimony was that he was upset because his brother-in-law had beaten up Hyman's sister. Iris Midgett called a friend of Hyman's and left a message that he should meet her at the Winchester Club because she knew where to locate Hyman's brother-in-law. Iris gave him some kind of pill at the nightclub.

On cross-examination, he stated that he had arrived at the victim's trailer but that he did not intend to go there. Instead, he asserted that he thought he was going to find his brother-in-law. He did not deny any of the events that led up to the shooting. He only denied that he killed Teagus

Griffis. Despite this denial, the state's evidence was uncontradicted that Hyman intended to kill.

Enmund does not provide direct guidance for resolving the issue of the stage in the proceeding where the jury should be instructed. In reaching its decision, the Court relied heavily on the fact that there was no "direct evidence" at trial that Enmund ever intended that lethal force be used. But this cannot be said for Hyman. At the very least, Enmund would require there be some evidence to negate the state's proof that the defendant intended that lethal force be employed. Unless this can be shown, a charge based on Enmund would not be proper at any stage of the proceeding. Hyman does not make this showing. For these reasons, the trial judge committed no error by failing to give a jury charge based on Enmund.

The Court has fully reviewed Hyman's petition, the briefs of counsel, and pertinent legal authority. It is of the opinion that the magistrate reached the correct result on these nine issues. The magistrate's findings are adopted and incorporated into this order by specific reference. It is, therefore,

ORDERED, that William Gibbs Hyman's petition for habeas corpus relief be, and the same is hereby denied. It is

ORDERED FURTHER, that the respondents' motion for summary judgment be, and the same is hereby, granted.

AND IT IS SO ORDERED.

s/Falcon B. Hawkins
U.S. District Judge

Charleston, S.C.
March 31, 1985.

Filed March 31, 1985.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
William Gibbs Hyman, Applicant, vs Daniel R. McLeod, South Carolina Attorney General, Respondent.	ORDER

This is a post conviction relief proceeding. The Applicant was convicted of murder and armed robbery and was sentenced to death. The South Carolina Supreme Court affirmed both the conviction and the sentence of death. The United States Supreme Court denied a Petition for a Writ of Certiorari, denied a Petition for reconsideration of its denial of the Petition for Writ of Certiorari. Applicant has applied to

this Court for post conviction relief. An evidentiary hearing was held.

On the night of March 24, 1979, the Applicant and four other persons travelled from North Charleston, South Carolina, to the home of two elderly men, Teagus and Collins Griffis, in Ravenel, South Carolina. They intended to rob the two men either through the use of deception or violence. They carried a shotgun and ammunition to accomplish their purpose. Applicant's wife and Susan Alday knocked on the door of the trailer, but were unable to entice the occupants outside. Thereafter, Alday, Robert Hinson and the Applicant went back to the trailer door. It was opened by the occupants, and one of Griffis brothers shot and seriously wounded Hinson. A general melee ensued. Collins Griffis was struck on the head

several times, blood was splattered throughout the trailer, and Teagus Griffis was shot in the chest with a shotgun and died. The Applicant and the other participants were arrested and charged with murder and armed robbery on or about April 1, 1979. The Applicant's family retained Mr. Demetrious J. Stratos to represent the Applicant and his wife. Mrs. Hyman subsequently obtained other counsel. On July 9, 1979, Mr. Stratos informed Judge Clyde Eltzroth that Mr. Hyman wished to have him relieved as counsel. Mr. Hyman stated upon questioning: "I just don't believe that Mr. Stratos is up to date on the law." The Motion was denied and the Clerk of Court was instructed to appoint an additional attorney for the Applicant. Mr. Landon Louthian was the second attorney appointed to represent

the Applicant. Prior to trial, the Solicitor offered Applicant a plea bargain whereby the State would abandon its request for the death penalty in exchange for a guilty plea. Mr. Stratos and Mr. Louthian advised the applicant that it would be in his best interest to accept the plea bargain. The Applicant refused, and the Court was informed of this fact. The case proceeded to trial.

At the conclusion of the post conviction relief hearing, I dismissed all of the grounds upon which Petitioner bases his allegation that his conviction and sentence are unlawful except those raising the issue of ineffective assistance of counsel. The grounds denied at the conclusion of the hearing were:

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6. Disproportionate Sentence-Lack of Triggerman Evidence:

Petitioner was denied his right not to be sentenced to death in the absence of a showing that he intended to kill the victim of the homicide with which he was charged, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 and Section 15 of the South Carolina Constitution.

I find imposition of the death penalty in this case does not offend the standards set out in Enmunds v. Florida, 50 U.S.L.W. 5087 (1982). The evidence shows that the Applicant did intend the death of the victim. The record clearly reflects that Applicant planned, prepared for and committed a brutal crime for the purpose of obtaining money. State v. Hyman, supra. A

shotgun and ammunition were taken to the scene by Applicant and his accomplices. Additionally, there was testimony at trial that Applicant was, in fact, the triggerman. Under the facts and circumstances of this case, Applicant cannot seriously contend that he did not intend or contemplate that life would be taken. See State v. Copeland, Op. No. 21808 (filed November 10, 1982).

7. Disproportionate Sentence-Equal Protection: Petitioner was denied Equal Protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that he alone of all his co-defendants was sentence to death where there is an absence of a finding that he was the "triggerman."

While all of the conspirators are equally guilty of the crime of murder as defined by the laws of this State, they are not ipso facto deserving of the same punishment. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). There is evidence in the record to support a finding that the Applicant was the triggerman. See State v. Shaw, supra.

***

In conclusion, I find Applicant was afforded all of his constitutional rights. All grounds presented by the Applicant in his Application for Post Conviction Relief, as amended, are dismissed.

AND IT IS SO ORDERED.

s/_____
James M. Morris,
Presiding Judge of the
Ninth Judicial Circuit

Manning, South Carolina
March 8, 1983

THE STATE, RESPONDENT,

v.

WILLIAM GIBBS HYMAN, APPELLANT.

No. 21524.

Supreme Court of South Carolina.

July 22, 1981.

***

NESS, Justice:

Appellant William Gibbs Hyman was convicted of murder and armed robbery and sentenced to death. We affirm.

On March 24, 1979, Teagus Griffis was shot and killed during the armed robbery of his home near Ravenel, South Carolina. Appellant and four accomplices were arrested and indicted for the crimes. Three of the accomplices pled guilty to non-capital offenses.

Appellant has raised numerous exceptions to his conviction and death sentence all of which are without merit.

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[23] Appellant argues the charge was erroneous because the trial judge failed to instruct the jury they could find as a statutory mitigating circumstance (1) he was an accomplice in a murder committed by another person and his participation was relatively minor; or (2) he was provoked by the victim. There is no evidence in the record to support such a charge, therefore, the judge did not err by refusing to give the instruction.

***

(14) Appellant asserts the death penalty imposed in this case is disproportionate to the severity of the offense. We are required under § 16-3-25 to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed

in similar cases[1] considering both the crime and defendant." The record clearly reflects appellant planned, prepared and committed a brutal crime for the purpose of obtaining money. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case.

The transcript of record in this case exceeds 650 pages. We have carefully reviewed the entire record for prejudicial error overlooked by counsel and find none. We affirm the conviction and sentence of death of appellant William Gibbs Hyman.

Affirmed.

LEWIS, C.J., and LITTLEJOHN, GREGORY and HARWELL, JJ., concur.

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[1] State v. Shaw and Roach, 273 S.C. 194, 255 S.E.2d 799 (1979).

§ 2254. State custody; remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process

ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other

reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;

> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered

as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an

appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

EDITOR'S NOTE

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No. 85-1461

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES AIKEN, WARDEN, CENTRAL CORRECTIONAL INSTITUTION, AND TRAVIS MEDLOCK, ATTORNEY GENERAL, STATE OF SOUTH CAROLINA,

Petitioner,

versus

WILLIAM GIBBS HYMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COMING B. GIBBS, JR.
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QUESTION PRESENTED

Whether under the unique facts of this case, certiorari must be granted to review the Fourth Circuit's decision granting Respondent a new sentencing hearing, in light of Cabana v. Bullock, even though: (i) the jury was erroneously instructed by the court in violation of Enmund v. Florida in response to a mid-deliberation inquiry at the penalty phase of Respondent's trial; (ii) South Carolina law requires that the jury alone make the sentencing determination; and, (iii) the state court record is inadequate to serve as the basis for a reliable post trial Enmund determination due to the grossly incompetent representation afforded Respondent at his trial.

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No. 85-1461

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES AIKEN, WARDEN, CENTRAL CORRECTIONAL INSTITUTION, AND TRAVIS MEDLOCK, ATTORNEY GENERAL, STATE OF SOUTH CAROLINA,

Petitioner,

versus

WILLIAM GIBBS HYMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Respondent, William Gibbs Hyman, responds to the Attorney General of South Carolina's Petition for A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. Respondent maintains that the Court of Appeals correctly ordered that he be given a new sentencing hearing and, therefore, certiorari is not warranted to review the Fourth Circuit's decision to vacate of the death sentence on the basis of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), in light of this Court's recent decision in Cabana v. Bullock, ___ U.S. ____, 88 L.Ed.2d 704 (1986).

STATEMENT OF THE CASE

In March of 1979, Hyman, Robert Hinson, Sue Allday, Iris Midgett, Respondent and his wife, Doris Hyman, concocted a drunken scheme to "flim-flam" two older brothers. The scheme was conceived during an evening of heavy drinking, and perhaps drug ingestion. One of the group, Iris Midget, had "flim-flammed" these same men once before. Mr. Hyman was too intoxicated to drive but the group traveled in his car.

Upon arrival at the men's trailer, Mrs. Hyman and Sue Allday went to the door. The brothers were intoxicated and watching television. However, they would not allow

the women to come into their house. The group shortly returned to the trailer. At that time, the door flew open and one of the brothers shot and wounded Mr. Hinson. Sue Allday admitted that she then fired a shotgun into the trailer. As all reviewing courts have found, a general melee then ensued. One of the brothers was struck on the head, and the other, Teagus Griffis, was shot in the chest and died. Mr. Hyman and his co-defendants were arrested and charged with murder and armed robbery.

Three co-defendants pled guilty: Mr. Hinson and Ms. Allday to murder (they each received mandatory life sentences); and Ms. Midgett to the charge of accessory to armed robbery (she received an eighteen year sentence). Mr. Hyman refused to plead guilty. Therefore, the state notified Mr. Hyman that it intended to seek the death penalty. Hyman's trial commenced on October 8, 1979. Defense counsel's strategy, to the extent there was a defense strategy, consisted of putting the State to its burden of proof. There was evidence that all parties, including the Respondent and the victims were extremely intoxicated. Defense counsel suggested, during the cross-examination of the victim's brother, that the shooting may have been an accident. However, no attempt was made to develop this into a coherent theory. Counsel's request for a manslaughter instruction was denied. Hyman was found guilty of murder on October 12, 1979.

The evidence presented by the defense at the penalty phase consisted of a minister and several family members. Hyman also took the stand and denied killing anyone. Like the argument given by defense counsel at the guilt phase, the arguments at the penalty phase were incoherent and ineffective. After several hours of deliberation, the jury asked: "[d]o we have to prove that he did the actual killing [in order to impose the death penalty?]". The judge instructed the jury that a person who is present as an accomplice is as culpable as the person who pulls the trigger. Within an hour, the jury returned with a sentence of death.

In order to properly understand and place in context the circumstances surrounding Mr. Hyman's trial and sentence of death, as well as to understand why the trial record is inadequate to serve as the basis for a reviewing court to make an Enmund determination, a more detailed examination of the ability of counsel and the events of the trial is necessary.

When Mr. Stratos, Hyman's retained counsel, first saw the Respondent, he did not keep office hours and he practiced "semi-actively" out of his home. He did not have

the current South Carolina Code, which contained the death penalty statute. Additionally, he did not have copies of any reporters or subscribe to any advance sheets.

Respondent moved before trial to relieve Mr. Stratos as his lawyer,[1] because, as he told the trial judge, he did not believe that Stratos was sufficiently "up on the law."[2] The judge did not relieve him but instead appointed Mr. Landon Louthian as co-counsel. Louthian testified at the Post-Conviction Relief Hearing that he did no research or investigation because Stratos was in charge of the case. There is no question, and it is not disputed, that Stratos was chief counsel and Louthian's role was a limited one.

Even after Mr. Stratos received formal notice that the Solicitor intended to seek the death penalty and even after Hyman told him that he would not plead guilty, he still did no pre-trial preparation. Hyman rejected the State's offer of a life sentence in exchange for a guilty plea to murder. However, he did so without counsel ever explaining the law of accomplice liability to him. As Respondent himself testified at the Post-Conviction Relief hearing:

> Q. Did Mr. Stratos ever explain to you the law of criminal agency, concert, criminal concert of action, the law of conspiracy?
>
> A. No sir. Mr. Stratos didn't explain those things.
>
> Q. Has that ever been explained to you?
>
> A. You have - you and Miss Stirling both have talked to me.

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(1) Arthur G. Howe, a former Assistant United States Attorney, a former Circuit Solicitor for the Ninth Judicial Circuit, and a highly competent and experienced trial attorney, was asked, based upon his observation of Mr. Stratos through the years, whether he had an opinion as to whether or not Mr. Stratos was generally competent to try any serious criminal case. Judge Morris sustained objection to this testimony, but Mr. Howe testified, as an offer of proof, that Mr. Stratos was not qualified to try most serious criminal cases.

deRosset Myers, an emminent member of the Charleston County Bar, a former president of the South Carolina Bar Association, a lawyer who has been extremely active in bar and legal matters for over thirty years, and who has been appointed by the South Carolina Supreme Court as a special General Sessions Judge, likewise offered the opinion, received only as an offer of proof, that based on his observation of Mr. Stratos, he was not competent to render effective assistance of counsel in any major criminal case.

G. Dan Bowling, a younger member of the Charleston Bar, a former law school professor, a former Public Defender for Charleston County, and an active practitioner in the criminal courts of South Carolina, likewise testified as an offer of proof that Mr. Stratos was not competent to try any serious criminal case.

(2) Stratos testified "I did not go to see him for approximately two months after he got up and made the statement that he didn't want my services any more, that I didn't know anything, so I wasn't interested in talking to him."

The principal evidence against Hyman was that of his testifying co-defendants, Hinson, Midget and Allday, and the surviving victim, Collins Griffis. However, counsel never talked substantively with these witnesses or made any effort to do so.

The Circuit Solicitor had an open file policy, both prior to, as well as during trial. All counsel obtained from the Circuit Solicitor's file was the statements of the co-defendants.

Stratos testified:

> A. At the time I got the file, I looked through it, but I don't at the time recall-I saw a statement the other day that was made by Hyman. It's a possibility that I even looked at it, but I looked through it this morning, and I'm almost positive that if I looked at it, I looked through the first or second pages and saw that he was telling untruths, so I didn't go on through with it. I don't see any-I'm sorry."

There was a statement in the file by a friend of Mr. Hyman, a Mr. Lindgren, which in part stated that Hyman told him: "[a]fter Bob [Hinson] got shot, Sue shot the man." Louthian stated that he did not see that statement but realized that it would have been useful in the event Hyman were to take the stand and claim Sue Allday did the shooting as a prior consistent statement to rebut an inference of a recent fabrication. Similarly, a letter from the Charleston County Police Department to the director of the FBI contained the following statement:

> Subject Teagus Griffis opened door at which time he was shot and killed by a shotgun blast. Subject Collins Griffis and suspects fought causing severe injuries to Collins Griffis head.

Mr. Louthian did not see this document, but again thought it would have been of some use. Furthermore, a police incident report was read to Mr. Louthian.

> That he and his brother were watching T.V., and it was just when Hee Haw Honeys was going off, when a woman came to the trailer and wanted some help. She had a flat tire. He told his brother not to open it up, "because some gangsters are around here." He stated that he tried to get his brother not to open the door, but his brother did it anyway. As soon as his brother did, there was a blast, and his brother stiffened out and fell backward on the floor. Then the next thing he knew, there was a flash and something hit his face. He layed there until they left, and "then I went to Mr. Brown's house for help."
> By further talking with the subject, he also stated that one of the women grabbed his brother's shotgun that was by the door, and she shot his brother with his own shotgun.
> A. Yes, Sir.
> Q. The solicitor did not make Plaintiff's Exhibit No. 8-or didn't give Plaintiff's Exhibit No. 8 to you, or did he?
> A. I don't recall ever seeing it prior to this; no sir.
> Q. That would have been of some use, if you would have had it at the trial of Mr. Hyman?
> A. I think it would, because it was Mr. Hyman's contention all along that he didn't shoot him, that he thought Sue Allday had done it."

This was, obviously, very important because the above material states that the surviving victim told the police that it was a woman who shot and killed his brother. As the above evidence makes clear, the real issue in this case was who was the triggerman. This strategy would, of course, maintain that Sue Allday fired the fatal shot. Mr. Hyman's case would thus depend upon both his testimony, and that of his wife, to contradict Miss Allday. At her trial, Mrs. Hyman testified that Sue Allday admitted to her that she had fired the fatal shot. However, Mrs. Hyman was not a witness at Mr. Hyman's trial. Counsel never sought her testimony.

Hyman was sent to the South Carolina State Hospital for a mental examination, but counsel did not talk to any of the doctors at the State Hospital, did not get a copy of the State Hospital records, and did not give any consideration to independent psychiatric or psychological witnesses. For the Post-Conviction Relief hearing, Dr. Ada Kirkman, a psychiatrist, examined Mr. Hyman, and testified that at the time of the offense Hyman's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, was substantially impaired. Additionally, she testified that in her opinion, Respondent was under the influence of a mental or emotional disturbance at the time of the crime. These are statutory mitigating circumstances pursuant to the South Carolina death penalty statute. See S.C. Code Ann. §16-3-20(c)(b)(2) and (c)(b)(6).

Counsel had not read the South Carolina Death Penalty Statute , S.C. Code Ann. §16-3-20 et seq. (Law.Co-Op. 1985), prior to the trial, and first read it in the period between the guilt and penalty phases. Further, they did no legal research generally, and did not read any South Carolina or United States Supreme Court decisions concerning the death penalty. Additionally, they did not discuss the problems incident to a death penalty case with any other attorneys. They were not familiar with the principles, of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and therefore, failed to participate appropriately in voir dire. The composition of the jury reflected their

unfamiliarity with Witherspoon.[3] Neither were they familiar with the case or the principles of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 793 (1978).

REASONS THE WRIT SHOULD NOT BE GRANTED

I. THE WRIT NEED NOT BE GRANTED UNDER THE UNIQUE FACTS OF THIS CASE TO REVIEW THE COURT OF APPEALS DECISION IN LIGHT OF CABANA V. BULLOCK BECAUSE: THE JURY WAS ERRONEOUSLY INSTRUCTED BY THE TRIAL COURT IN VIOLATION OF ENMUND V. FLORIDA IN RESPONSE TO A MID-DELIBERATION INQUIRY AT THE PENALTY PHASE; SOUTH CAROLINA LAW REQUIRES THAT THE JURY ALONE MAKE THE SENTENCING DETERMINATION; AND, THE TRIAL RECORD IS INADEQUATE TO SERVE AS THE BASIS FOR A RELIABLE POST TRIAL ENMUND DETERMINATION DUE TO THE GROSSLY INCOMPETENT REPRESENTATION AFFORDED RESPONDENT AT HIS TRIAL.

There are at least three reasons certiorari is not warranted to review the Fourth Circuit's decision that Mr. Hyman is entitled to a new sentencing hearing under the unique facts of this case. First, the trial court's instruction, in response to a mid-deliberation inquiry at the penalty phase of Hyman's trial, permitted the death penalty to be imposed in violation of Enmund. Second, South Carolina law requires that the Enmund determination be made by the jury alone. Finally, the trial record in this case cannot support an adverse determination on the Enmund issue, sufficient to satisfy the Eighth Amendment's demand for reliability, due to the gross incompetence of counsel at Hyman's trial.

A. This Court's holding in Cabana and the holding of the Fourth Circuit in Hyman

In Cabana v. Bullock, ___ U.S. ___, 88 L.Ed. 2d 704 (1986), this Court held that "the Eighth Amendment does not require that a jury make the findings required by

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(3) At trial, juror Manigault Jenkins was excused for opposition to the death penalty, the attorneys for the defendant asking no questions. At the hearing for Post-Conviction Relief, this juror was tendered as a witness. The judge refused to allow the introduction of his testimony. Respondent presented an offer of proof that if Mr. Jenkins were allowed to testify, he would state that if he had been asked, he would have stated that his opposition to capital punishment was not unequivocal, and that he would have been able to consider, and perhaps could have voted to impose the death penalty.

Enmund," i.e., that the death penalty cannot be imposed on one who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed. 88 L.Ed. 2d at 720. The concerns of the Eighth Amendment are met as long as the requisite Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), findings are made in "an adequate proceeding before some appropriate tribunal." Cabana, supra, 88 L.Ed.2d at 720.

In this case, the Fourth Circuit held that a judge's charge in response to the following request by the jury during the penalty phase of Hyman's trial: "[d]o we have to prove that he did the actual killing?" -failed to satisfy the constitutional concerns expressed by this Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Enmund v. Florida, supra. Hyman v. Aiken, 777 F.2d 938, 940 (4th Cir. 1985). The trial judge's supplementary instruction, in pertinent part, was as follows:

> I can't get into a discussion with you on the facts of the case....You may return a death sentence if there is a mitigating circumstance present if you find at least one aggravating circumstance is present....
>
> I charged you earlier that a person who aids and assists another in the commission of the offense or who was present at the time and committed the offense, would be equally guilty because under the hand of one, the hand of all theory, a person who commits the offense in concert with other is guilty obviously and anyone who assists the person committing an offense is guilty. But you've passed the question of guilt or innocence. It would be proper for you to consider in matters of mitigation or aggravation obviously whether this Defendant used the weapon or whether he didn't; but I'm not going to get into the facts with you now and try to reach any decision or suggest any opinion I may have as to what your position should be so far as a recommendation of sentence because under our Constitution, I can't comment on the facts....

Less than an hour after being "reinstructed", the jury returned with a verdict of death.

The panel of the Fourth Circuit, which heard the appeal from the denial of habeas corpus relief in this case, concluded:

> The Court's supplementary instruction in response to the foreman's question is inconsistent with Enmund v. Florida. Having found that murder was committed during an armed robbery, the jury could reasonably conclude that the instruction authorized it to recommend the death sentence even if it found as a mitigating circumstance that Hyman was not personally responsible for the murder. The instruction allowed the jury to recommend a death sentence for Hyman as an aider and abettor whether or not he killed, attempted to kill, or intended to kill the robbery victim. Consequently, the sentence of death imposed on recommendation of an erroneously instructed jury cannot be carried out, and Hyman must be resentenced. 777 F.2d at 940.

The Petitioner, the Attorney General of South Carolina, has argued that certiorari is warranted to resolve the conflict between this Court's decision in Cabana, supra, and the Fourth Circuit panel opinion in Hyman, supra. In doing so, the petitioner described the panel opinion as holding: "an individual could be sentenced to death only if a jury made a finding in the punishment stage of a bifurcated trial that the person killed, attempted to kill, or intended to kill." Petition for Cert. at 18. The Petitioner's paraphase of the Fourth Circuit opinion is incorrect. A fair and proper reading of the panel opinion demonstrates no conflict between Cabana and Hyman.

B. The Significance of the Jury's Request for Guidance at the Penalty Phase of Hyman's Trial

The uniqueness of the factual situation involved in this case discredits Petitioner's argument. The jury, sua sponte asked the trial court for guidance as to the degree of culpability necessary in order to impose the death penalty. Thus this is not a case in which a defendant asked for an Enmund instruction and the request was denied or even a case in which no request of any type was made. Although, under Cabana, a defendant may not be constitutionally entitled to have the jury make the Enmund determination, and have the jury so instructed, it would certainly seem that if a jury requests guidance on the issue, a defendant is constitutionally entitled to an accurate description of the law. See Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985); California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).(4) To reach any other conclusion would allow a "level of uncertainty and unreliability in the fact finding process...[that] cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625, 643, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

The panel correctly determined that the "reinstruction" given in this case indicated to the jury that it was permissible to sentence Hyman to death even if he were no more than an aider and abettor with no intent to kill or knowledge that a killing would take place. Clearly a death penalty, with that factual basis, contravenes Enmund. Due to

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(4) In Caldwell, supra, this Court found that one of the main flaws with the prosecutor's closing argument at the penalty phase of Caldwell's trial was that it was not an inaccurate statement of the law. 105 S.Ct. at 2643. Conversely in Ramos, supra, the majority, in upholding the constitutionality of the "Briggs" instruction, relied upon the fact that the instruction was an accurate statement of the law. 463 U.S. at 1010.

the fact that the jury requested guidance and received an inappropriate instruction the Petitioner's characterization of the panel opinion's holding is misguided. It cannot be said that the erroneous instruction had "no effect on the sentencing decision" and thus "that decision does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, supra, 105 S.Ct. at 2646. In context, the decision is a narrow one based upon unique facts. Certiorari is not warranted; Cabana does not and should not affect the outcome in this case.

C. South Carolina Law Requires that the Sentencing Jury Make the Enmund Determination

The Attorney General of South Carolina neglected to mention, in its Petition for a Writ of Certiorari, that the South Carolina Supreme Court, in State v. Peterson and Stubbs, ___S.C.___, 335 S.E.2d 800 (1985)[5] determined, as a matter of South Carolina criminal procedure, that:

> "[d]uring the penalty phase of death penalty cases which involve conspiracy liability, the trial judge should charge that the death penalty can not be imposed on an individual who aids and abets in a crime in the course of which a murder is committed by others, but who did not himself kill, attempt to kill, or intend that a killing take place or that if lethal force be used."

The Fourth Circuit panel relied upon this case in reaching its decision. Hyman, supra, 777 F.2d at 940 n. 1. The South Carolina Supreme Court's decision was issued while this case was pending in the Fourth Circuit.

In Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980), this Court held that where state law creates a liberty interest in having the jury make particular findings, the Due Process Clause does not permit appellate findings to protect that entitlement. Hicks, supra, 447 U.S. at 347; See also Cabana, supra, 88 L.Ed.2d at 717, n.4. This Court stated:

> [w]here, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law.

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(5) It should be noted that in Peterson, supra, the court discussed three separate issues, a conspiracy charge, a malice charge and the Enmund issue. The Court found that Appellants were entitled to a new trial due to the fact that the conspiracy charge allowed the jury to find one of the appellants guilty of murder on the basis of a conspiracy to commit the larceny of a motor vehicle. The court then found a Sandstrom error and finally held that in conspiracy cases a defendant was entitled to an instruction that forces the jury to make the Enmund determination.

> The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury. . . .[citations omitted] Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law. Hicks, supra, 447 U.S. at 346.

State v. Peterson, supra, makes clear that there is a state law entitlement to have the jury make the Enmund determination. In Peterson, the South Carolina Supreme Court construed the existing South Carolina Death Penalty Statute, S.C. Code Ann. §16-3-20 et. seq., which has not been amended during any period relevant to this case, to require that the jury be given an Enmund type instruction. Thus, pursuant to Hicks, Hyman is constitutionally entitled to have the life/death decision made by a properly and adequately instructed jury. To not give effect to Peterson's creation of a state law entitlement to have the jury make the Enmund determination would do no more than permit the State of South Carolina to perform "one last cruel and unusual punishment. See Jones v. Thigpen, 741 F.2d 805, 807 (5th Cir. 1984).(6) Therefore, for the additional reason that pursuant to South Carolina law, the jury is required to make the Enmund determination, the Fourth Circuit's decision was correct and certiorari is not warranted.

D. The Trial Record is Inadequate for an **Enmund** Determination Due to Counsel's Incompetence

Respondent's opposition to the Petition for a Writ is not based simply upon Respondent's contrary reading of Cabana v. Bullock or the context of South Carolina law. Rather, Respondent maintains that the trial record cannot support an adverse determination on the Enmund issue. Cabana did not weaken this Court's demand that any sentence of death comply with the Eighth Amendment's concern for reliability. Accurate findings in an adequate proceeding are constitutionally mandated. Cabana, supra, 88 L.Ed.2d at 720. Obviously, a prerequisite to any "adequate" finding is that the record be

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(6) It should be noted that applying Peterson would have little adverse effect on South Carolina's administration of its system of criminal justice. Only a few cases, at most, would be touched by the ruling. See generally Enmund v. Florida, supra, 458 U.S. at 791-97 (this Court acknowledged its holding "touched only a handful of death row inmates"). To deny Appellant relief merely because Hyman's trial preceeded the decision in Peterson and Stubbs, would be unprincipled and unjust. One would die, while others similarly situated live, for no other reason than the timing and vagaries of appellate litigation. It is difficult to imagine a basis for a sentence of death less compatible with the fundamental commandment of the Eighth Amendment that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice." Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977).

sufficient to support any findings drawn from it. In rejecting Hyman's claim, both the State Post-Conviction judge and the South Carolina Supreme Court relied solely upon the trial record. However, due to trial counsel's gross incompetence, the trial record is inadequate to support an adverse determination on that issue. Furthermore, other instructions given at Hyman's trial further skewed the culpability decision.

1. The Effect of Trial Counsel's Performance

First, it is not disputed that the representation Hyman received was far from ideal. The federal magistrate to whom the case was referred found that Hyman was denied the effective assistance of counsel. The Court of Appeals, although finding counsel were not constitutionally ineffective as to the guilt phase, did not reach the question of ineffective assistance at the penalty phase. The panel noted, however, that the "most serious charges [of ineffectiveness] against trial counsel involved the defeciencies" at the sentencing phase. Hyman, supra, 777 F.2d at 941. The incompetence of counsel skewed the culpability decision required by Enmund adversely to Hyman.

As the statement of facts points out, defense counsel were not familiar with Witherspoon, Lockett, or any other death penalty decisions of this or any court. They did not even read the death penalty statute until after Hyman was convicted of murder. Substantial evidence in the state's file, made available to defense counsel, indicating that Hyman was not the triggerman, went undiscovered. Additionally, although Hyman at all times maintained that Sue Allday shot the victim, counsel barely pursued this theory at trial. Hyman's wife, who corroborated his story, was not even called. Additionally, witnesses in mitigation were not called and those that testified were not previously prepared nor was the nature of the penalty phase proceeding explained to them.

Therefore, pursuant to the requirements of Cabana, based upon the evidence at Hyman's trial, a reviewing court cannot adequately say, sufficient to meet the Eighth Amendment's concern and demand for reliability, that Hyman killed, attempted to kill, or knew that a killing would take place. The defense theory, to the extent that there was a

defense theory[7], raised the possibility that the victim was accidently shot by his brother, or by another defendant, during a struggle for a weapon. There was no testimony at trial as to who actually fired the shot that killed Teagus Griffis except for that of Hyman's accomplices who testified in exchange for a favorable plea bargain. Moreover, even accepting the accomplices' versions of events, no one saw Hyman shoot the victim.[8] At the penalty phase, Hyman testified and specifically denied that he killed anyone. The foreman's request, after three hours of deliberation at the penalty phase, indicates that the jury, at the very least, took his testimony and version of events seriously. The instruction given by the judge, in response to the jury's inquiry, only complicated the problem and allowed a sentence of death to be imposed in contravention of Enmund. Therefore, due to counsel's inadequacies, the trial record cannot support the State Post-Conviction Court's adverse determination on the Enmund question. Thus there is no conflict between the Fourth Circuit's decision in Hyman and this Court's ruling in Cabana, and certiorari is not warranted to review the panel's determination that Hyman is entitled to a new sentencing hearing.

2. The Effect of other Jury Instructions

By Cross-Petition, Respondent has petitioned for a writ of certiorari to review the Fourth Circuit's determination denial of his claim that the malice instruction given at Hyman's trial did not warrant a new trial. The Cross-Petition sets out in greater detail

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(7) There was, in essence, no defense theory, and certainly no coherent defense theory, at either the guilt phase or the penalty phase. What "theory" there was amounted to suggesting the possibility that the victim was killed by another co-defendant or accidently by his own brother, and putting the State to its burden of proof. The panel, although apparently finding that counsel's performance was deficient, found no prejudice at the guilt phase. Because habeas corpus relief was granted as to the penalty phase, the panel reserved ruling on ineffective assistance of counsel at the at the penalty phase. Obviously, counsel's total inadequacy makes the record very undeveloped on the Enmund claim. Still there is enough confusion in the record to refute the Petitioner's contentions.

(8) This theory was pursued by the defense during cross-examination and closing arguments at the guilt phase. There was also testimony establishing that all parties, including the defendant, were extremely intoxicated. The jury was given an instruction regarding accomplice liability a charge that they could consider Hyman's intoxication on the issue of malice and intent, and an erroneous burden shifting charge on malice. Thus not only could the jury have found Hyman guilty on an imputed accomplice liability theory, the jury could have presumed malice from Hyman's doing of an unlawful act, i.e., being involved in the robbery. A case similar to Hyman's i.e., involving an Enmund as well as a Sandstrom problem, is Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982). The Court in Clark, recognized how a faulty charge on the issue of intent could skew the fact finding process, thus, resulting in a sentence of death.

Respondent's claim and Respondent would refer this Court to that pleading. Respondent would note at this point that the malice instruction is an additional reason the Attorney General of South Carolina's Petition for a writ of certiorari should be denied.

First, the malice instruction given at Hyman's trial, as the Fourth Circuit realized, is indistinguishable from the one given in Yates v. Aiken.[9] This Court summarily reversed the South Carolina Supreme Court in Yates and remanded for reconsideration in light of Francis v. Franklin, 472 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). (holding that the malice instruction violated the principles of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)). Yates v. Aiken, ___ U.S. ___, 88 L.Ed. 2d 218 (1985). Thus, it seems clear that the malice instruction is in conflict with Francis v. Franklin, 472 U.S. _____, 105 S.Ct. 1905, 85 L.Ed. 2d 344 (1985). The Fourth Circuit assumed that was the case. Hyman, supra, 777 F.2d at 941.

Under the peculiar facts of this case, the following scenario is highly likely. Hyman was found guilty of murder based upon implied malice and/or accomplice liability, which was also charged. The two instructions, either independently or in tandem, resulted in a finding of malice. Then at the penalty phase the finding of malice was bootstrapped into a sentence of death. This is not just speculation but is probable, especially due to the jury's request for guidance, after extended deliberations, at the penalty phase of Hyman's trial. Less than an hour after being "reinstructed", the jury returned with a sentence of death. The judge's charge only exacerbated the problem. Due to the combined effect of the errors a new sentencing hearing is the only way this or any court can determine if the death penalty is appropriate in this case.

CONCLUSION

The Respondent, William Gibbs Hyman, submits that for all the reasons stated above, the Fourth Circuit correctly decided that he was entitled to a new

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(9) The South Carolina Supreme Court has held that virtually identical instructions are impermissible burden shifting instructions. State v. Elmore, 279 S.C. 781, 308 S.E.2d 781 (1983); State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984).

sentencing proceeding in conformity with the requirements of the Eighth and Fourteenth Amendments. Therefore, Respondent requests that certiorari be denied.

Respectfully submitted,

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April 1, 1986.

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CERTIFICATE OF SERVICE

I do certify that I have this date served Respondent's Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on the Petitioner by depositing a copy of the same in the United States Mail, first-class postage prepaid, and addressed as follows:

Donald J. Zelenka
Chief Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

This 1st day of April, 1986.

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